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89-1144

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ERNEST E. SARGENT and CYNTHIA L. SARGENT,
Petitioners,

v.

PAINEWEBBER INCORPORATED, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does an arbitration panel of only three persons exceed its power under 9 U.S.C. § 10(d) of the Federal Arbitration Act in making a lump-sum award after hearing a controversy involving a claim in excess of $500,000.00 where the claimant had agreed to arbitration only under the rules of the New York Stock Exchange ("NYSE"), rule 607 of which requires that five members must sit on the panel in all matters involving non-NYSE members like those here where the amount in controversy is $500,000.00 or more?

2. Is a lump-sum award made by a three person panel ambiguous within 9 U.S.C.§ 10(d) of the Federal Arbitration Act as to whether it was intended to determine both a claim for compensatory damages and one for punitive damages where both claims were presented to the three arbitrators and their award

announced that it was in full and final settlement of the matter, but where the rules of the NYSE under which arbitration was had require controversies involving over $500,000.00 to be heard by five arbitrators, the claim for compensatory damages alone involved less than $500,000.00, but the claims for compensatory damages and punitive damages together exceeded $500,000.00, and where the panel provided no opinion, no record of proceedings, and no computation of damages from which to glean whether the arbitrators intended to determine a controversy involving over $500,000.00 in violation of NYSE rules?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Ernest E. Sargent and Cynthia L. Sargent and respondents PaineWebber Incorporated, formerly known as Paine Webber,

Jackson & Curtis, Inc., and its employees Kevin Greenan, Bruce Edgington, C. Jordan Ball and Joan Doyle.

The respondents before this Court include PaineWebber Incorporated and Kevin Greenan.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ERNEST E. SARGENT and CYNTHIA L. SARGENT,
Petitioners

v.

PAINE WEBBER INCORPORATED and KEVIN GREENAN,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

Petitioners Ernest E. Sargent and Cynthia L. Sargent respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled proceeding on August 15, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 737 F.2d 246, and is reprinted in the appendix hereto p. 1a infra.

The memorandum decision of the United States District Court for the District of Columbia (Parker, B.J.) of December 8, 1987 is reported at 674 F. Supp. 920. That Court's memorandum decision of May 10, 1988 denying reconsideration has not been reported. Both are reprinted in the appendix hereto, p. 21a infra.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §1332, petitioners brought this suit in the District of Columbia. On October 31, 1984 the District Court dismissed the action without prejudice, allowing petitioners to seek appropriate judicial relief following completion of arbitration proceedings as

provided by prior agreement among the parties and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14. The Court subsequently granted petitioners' motion to vacate the arbitration award, remanded the matter to the arbitrators, and denied the motion of Paine-Webber Incorporated ("PaineWebber") to confirm the award. PaineWebber sought certification of an appeal to the District of Columbia Circuit, to which the Circuit consented. That Circuit entered a judgment and opinion on August 15, 1989 ruling that the District Court had erred in not confirming the award and remanding to that Court for entry of a suitable order. Petitioners petitioned timely for rehearing and suggested en banc consideration on September 14, 1989. The District of Columbia Circuit denied such on October 13, 1989.

Jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

9 U.S.C. § 10:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that

a mutual, final, and definite award upon the subject matter was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Petitioner Ernest E. Sargent ("Sargent") had never invested in the stock market until, at age 50, retired on disability, he opened accounts with Merrill Lynch, Pierce, Fenner & Smith and Anderson and Strudwick. Almost immediately respondent Kevin Greenan ("Greenan") began soliciting his account for PaineWebber Incorporated ("PaineWebber"), telephoning him almost daily, criticizing the handling of his account transactions by the Merrill Lynch account executives, assuring Sargent he could earn much more money for him

than Merrill Lynch could, and offering a 35% commission discount. After three weeks of high pressure salesmanship Sargent switched his accounts, representing his life savings valued at approximately $290.024.00, to PaineWebber.

Greenan falsified PaineWebber's client qualification forms by filling in net worth and income figures higher than the actual figures provided by Sargent. He described Sargent on the forms as an extensively experienced investor, which he plainly was not. Greenan operated Sargent's account as a discretionary account and as a margin account without explaining to Sargent what was involved in such actions after getting his signature on PaineWebber forms. Greenan failed to carry out specific instructions by Sargent to sell stocks if they reached a certain market value. In five months $256,098.00 of Sargent's total investment was

lost while being mismanaged by PaineWebber in this manner.

On September 18, 1984 Sargent filed in the District Court for the District of Columbia a complaint against respondent for negligent management and breach of fiduciary duty. PaineWebber moved to stay proceedings pending arbitration. Sargent honored the agreement to arbitrate he had made with PaineWebber, while asserting that "such a stay of these proceedings is not appropriate as to the plaintiffs' punitive damages claim if the arbitrators do not have authority to award punitive damages to the plaintiffs ... Accordingly, plaintiffs reserve the right to litigate their claim for punitive damages in this action, if necessary, following the completion of arbitration proceedings." (Petitioners' October 29, 1984 RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDING PENDING ARBITRATION, Civil Action No. 84-2911). The

Court, Parker, J., granted the stay and dismissed the action "without prejudice to plaintiffs' right to seek relief, if appropriate, following the completion of arbitration." (Order, October 31, 1984).

The New York Stock Exchange ("NYSE") was chosen as the arbitral forum. Sargent filed before it a claim for negligent management of investment account, breach of fiduciary duty and breach of contract.

He sought a total of $800,000.00 in damages, $300.000.00 in compensatory damages and $500,000.00 in punitive damages. Arbitration was to be conducted under NYSE rules, the only rules which Sargent agreed to, a copy of which the NYSE Arbitration Counsel supplied to Sargent. Rule 607 of the rules as provided required that in matters involving public customers like Sargent where the amount in controversy is in excess of $100,000.00 the NYSE was to appoint a panel

of five members. The NYSE Arbitration Counsel sent Sargent, then representing himself pro se, a list of names of three arbitrators who were to form the panel to hear the controversy scheduled for August 13, 1985. Upon receipt Sargent telephoned the Arbitration Counsel to refuse the three proposed arbitrators and to request that other members of the panel be selected to minimize the possibilities of prejudice. During this conversation Sargent pointed out that his controversy involved a claim for $800,000.00 and that rule 607 required that five arbitrators be empaneled. The Arbitration Counsel acknowledged that requirement of the rule, said she would designate five arbitrators, and rescheduled the hearing originally scheduled for August 13, 1985. Nevertheless, the arbitration hearing took place in July, 1986 before a panel of three arbitrators designated by the Arbitration Counsel, and not the five person

panel required by rule 607 which Sargent had requested.*/

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*/Recognizing that matters of record fact must be developed in the trial court, Sargent notes that this discussion with the Arbitration Counsel is not reflected in the record below. It could not be, since, as permitted by NYSE rules, the arbitration panel kept no record. Sargent thus merely represents that, having read the rules supplied to him by the NYSE Arbitration Counsel, he discussed the five person requirement of rule 607 in a telephone conversation with that counsel noting that his claim was over the threshold requiring a five person panel rather than only three arbitrators.

The record of District Court proceedings does reflect that PaineWebber argued in opposition to Sargent's subsequent motion to vacate the arbitration award that in asserting that five arbitrators were required in his case Sargent relied on an out dated version of the rules (December 29, 1986 RESPONSE TO PLAINTIFFS' MEMORANDUM). Paine-Webber's argument had no point, however. The amended version of rule 607 supplied by PaineWebber (in Exhibit I to December 12, 1986 DEFENDANTS' CROSS-MOTION TO CONFIRM ARBITRATION AWARD) provides that five arbitrators shall be named in all matters where the amount in controversy is $500,000.00 or more unless the parties agree in writing to a panel of three arbitrators. Sargent never agreed in writing or in any other manner to a panel of only three arbitrators. This is uncontroverted. The

At the rehearing an expert witness who is a branch manager of a NYSE firm and a former compliance officer gave unchallenged testimony that Sargent's account was grossly mismanaged by PaineWebber. Evidence established that Account Executive Greenan and PaineWebber at their own discretion churned, made unauthorized purchases, and made unsuitable margin deals without Sargent's appreciating the manipulations putting his life savings at risk. On August 16, 1986 the panel ruled in Sargent's favor and awarded him "in full and final settlement" a total of $46,000.00, $43,000.00 was against PaineWebber and $3,000.00 against Greenan. No record of

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record contains no such written agreement. Since his claim exceeded $500,000.00 by $300,000.00, under either version of the rule, the one supplied to Sargent by the NYSE or the one supplied to the Court by Paine-Webber, a panel of five was required if the panel was not to exceed its powers under NYSE rules in this case. The text of both versions is contained in the appendix.

proceedings was kept. No opinion was provided showing whether the arbitrators had considered the punitive damages claim as well as compensatory damages. No computation of damages was provided showing what amount of the award represented compensatory damages and what amount, if any, represented punitive damages. The NYSE denied Sargent's request for a rehearing.

On November 26, 1986 Sargent moved the District Court to vacate the award on grounds, inter alia, that the NYSE had violated its own arbitration rules by having three arbitrators rather than five. Sargent renewed therein his claim before the Court for punitive damages. He alleged that Paine-Webber had employed Greenan in a position of trust although it knew that he had a previous criminal record, having been arrested for stealing money, been convicted of a lesser offense, been fined and given a suspended

jail sentence. Sargent alleged that Paine-Webber knew that Greenan had lied on a 1981 application for a broker's license when he denied ever having arrested for stealing.#/

PaineWebber cross-moved to confirm the arbitration award. The District Court found its responsibility for judicial review

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#/Publicly available documents of the Public Service Commission of the District of Columbia show that while a college student Greenan entered the room of a fellow student who reported the entry to campus security, to which Greenan admitted the entry. Greenan stated - in a Uniform Application for Securities Industry Registration that he had pleaded guilty to a misdemeanor trespass charge. Greenan's statement in this application withheld the facts that he had admitted to the investigating officer that he took $30.00 from the complainant's room, that he was arrested for petit larceny, and that he later pleaded guilty to trespass and was sentenced to 10 days incarceration, suspended conditioned on his making restitution to the complainant and showing one year's good behavior (Docket CJ 00078, General District Court, Williamsburg, Virginia, trial date February 24, 1977). Greenan falsely answered "No" to a question on the Application whether he had ever "been arrested ... for any misdemeanor ... involving any crime in which ... wrongful taking of any property ... was a factor."

extremely difficult to accomplish in the absence of any arbitration record, of any opinion, and of any "explanation of the damage calculation" which was only one fifth of the amount claimed without consideration of the punitive damage claim (December 8, 1987 Memorandum Order). Due to "ambiguity surrounding the Sargent's $46,000 award" and because the Court could not "clearly ascertain the basis for the award" or the scope of arbitral consideration of the matter the Court vacated the award and remanded to the arbitrators for "a full explanation of the manner in which damages were computed" so as to permit effective judicial review. The Court's Order did not require the arbitrators to disclose their reasoning underlying the award beyond explaining the calculations which went into the manner in which damages were computed.

PaineWebber moved for reconsideration. On May 10, 1988 the Court denied reconsideration and reaffirmed its holding "that it should not attempt to enforce an award that is ambiguous, indefinite or irrational." It believed it was necessary to understand the calculation methods used by the arbitrators and again remanded to arbitrators for an explanation of the manner in which damages were computed. In doing so the Court relied on decisions of the Second, Third, Fifth, Sixth, and Ninth Circuits. PaineWebber moved the District Court to certify appeal to the Court of Appeals from its order denying confirmation, representing that "there are substantial controlling questions of law, concerning the subject matter authority of this Court to require arbitrators to explain their award ... as to which there are distinct differences of opinions within this Circuit and with other

Circuits" (May 31, 1988 MOTION FOR CERTIFICATION). The Court of Appeals granted appeal in this case of first impression in the District of Columbia Circuit ("Columbia Circuit").

In an August 15, 1989 decision the Columbia Circuit found no basis for a remand to the arbitrators. It ruled that the District Court's duty had been to confirm the arbitration award and remanded to that Court for entry of a suitable order. It held that a lump-sum award made without opinion or any record of proceedings may not be rejected for want of explanation by the arbitrators in the absence of facts making it appear probable that the arbitrators committed an error justifying vacation of the award. The Court purported to follow the Second Circuit's decision in Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972) - where, unlike the instant case, there was a full transcript of

hearings before five arbitrators under NYSE rules on a $34,000.00 claim - that forcing arbitrators to explain their award even when grounds for it can be gleaned from the record was improper as unjustifiably obstructive of efficiency. PaineWebber had insisted in brief and oral argument that the lump-sum award was intended to resolve the punitive damage claim as well as the compensatory claim. The Court of Appeals rejected Sargent's argument that the award was ambiguous and his suggestion that the arbitrators may not have resolved the punitive damage issue as "utterly fanciful." The Columbia Circuit treated the District Court's request for a "full explanation of the manner in which damages were computed" as identical with insistence on an explanation of the arbitrators' thought process in arriving at an award. The Columbia Circuit agreed in words with the Second Circuit's

declaration that courts may inquire into the basis of a lump-sum award when they believe the arbitrators rendered it in "manifest disregard" of the law or if the facts of the case do not support the award, as stated in Koch Oil, S.A., v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985). The Columbia Circuit recognized that the District Court had apparently proceeded under the theory that in the absence of an explanation it could not be sure that the arbitrators had not "exceeded their powers" under § 10(d) of the Federal Arbitration Act. But the Court of Appeals was silent on the manifest violation, which had been argued to it, of NYSE rules requiring a five person panel if punitive damages were to be considered by arbitrators. The Columbia Circuit apparently did not consider this patent violation sufficient indication that the three person panel had not intended to

consider the punitive damage claim to justify the District Court in remanding to to the arbitrators for an explanation of the manner in which the $46,000 in damages had been computed to determine whether or not some portion had been allocated to punitive damages. Despite the undeniable violation of the rules which Sargent had agreed to be bound by, the Circuit felt both that the three member panel had resolved the punitive damage claim and that, nevertheless "Here there is nothing to suggest that the arbitrators indulged in any disregard of the law."

On September 14, 1989 Sargent petitioned for rehearing and suggested a rehearing en banc, again arguing that a manifest violation of NYSE rules had occurred if the award were considered to have resolved the punitive damage claim. On October 13, 1989 the Court denied the petition and the suggestion.

REASONS FOR GRANTING THE WRIT

I

The first impression decision by the District of Columbia Circuit professedly adopting the Second Circuit's rule accepting lump-sum arbitration awards without explanation of grounds therefor (a) extends that rule beyond the Second Circuit's limits to include cases where no record of proceedings or damage calculation is available from which the grounds for or the meaning of the bare award may be gleaned; (b) conflicts with decisions of other Circuits as well, and (c) overlooks strong indications that the arbitrators exceeded their powers.

The Columbia Circuit rejected the idea "that a lump-sum award can be rejected for want of explanation of the manner in which damages were computed in the absence of facts making it probable that the arbitrators committed error justifying vacation of the award." It cited and purported to follow the Second Circuit's rule exemplified in Sobel v. Hertz, 469 F.2d 1211 (2d Cir. 1985) and Koch

Oil, S.A. V. Transocean Oil Gulf Co., 751 F.2d 551 (2d Cir. 1985). There is a critical difference between the Columbia Circuit's ruling which effectively abolishes judicial review of lump-sum awards made without a record of arbitration and the Second Circuit's rule which does not. The Columbia Circuit applies this rule to lump-sum awards like the instant case where there is no record whatsoever of arbitration proceedings. The Second Circuit does not. In the Second Circuit's Sobel v. Hertz, Warner & Co. case the District Court had before it a complete transcript of arbitration proceedings, and "excellent memoranda of law and summations of counsel" prepared and used before the arbitration panel. The Second Circuit declared that

> "forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the (arbitration) process now achieves." 469 F.2d 1211, 1215.

In Sobel there was a complete record from which grounds for the lump-sum award could be gleaned, or from which indications of "manifest disregard of law" or the exceeding of arbitral power could be gleaned. In the instant case there was no arbitration record whatsoever, either complete or not complete, from which either could be gleaned. The difference is the difference between effective judicial review, albeit in a very narrow range, and the effective abolition of judicial review of arbitration proceedings producing a lump-sum award with no record or opinion.

The Columbia Circuit professed to draw the distinction between trial court remands to arbitration for clarification of an award's meaning and remand for an explanation of the arbitrators' reasons for arriving at the award. But it declined to apply that important distinction in this case. Faced with a post arbitration demand by Sargent

that the District Court proceed to hear his punitive damage claim and with a strong showing that the three person arbitration panel would have exceeded its powers under NYSE rules had they determined the punitive damage claim in their "full and final settlement," the District Court Order remand to the arbitrators, not for an explanation of reasons for the cryptic lump-sum award, but for "a full explanation of the manner in which damages were computed so as to permit effective judicial review". Such an explanation which would have shown the puzzled District Judge whether or not the arbitrators had intended to determine Sargent's punitive damage claim as well as his compensatory damage claim. However, the Columbia Circuit treated the District Court's Order as if it had sought the arbitrator's reasons for their award. Though there was nothing in the (non existent) arbitration

record from which anything could be gleaned, whether grounds for the award, clarification or its meaning, manifest disregard of the law, or indications that the arbitrators had probably exceeded their powers, the Columbia Circuit declared that it had been the duty of the District Court to confirm the award and that it had erred in remanding to the arbitrators for an explanation of the manner in which damages had been computed. This case of first impression has put the Columbia Circuit and the Second Circuit in serious conflict.

Other Second Circuit cases, including those relied on by the District Court, show the difference between cases where some arbitration record is available, whether complete or less than complete, and where none whatsoever is available. They show the conflict between the circuits in ruling on these two types of cases. In Siegel v. Titan

Industrial Corp., 779 F.2d 891 (2d Cir. 1985), relied on by the District Court herein, a copious 4,000 page record of arbitral testimony allowed both the District Court and the Second Circuit thereafter to glean support for the arbitration award and to conclude that it should be confirmed. Second Circuit dicta stated that the award "appears to have been reached on the basis of a precise mathematical calculations", so that a remand to arbitrators for clarification would not improperly require arbitrators to reveal their reasons and would have been proper had not an affidavit submitted to the District Court shown that grounds existed for the lump-sum award and made a remand for clarification unnecessary.

In Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42, 45 (2d Cir. 1985), the District Court had before it 2,500 pages of arbitration transcript and a three page final report stating many rulings on property

disposition which went well beyond a bare lump-sum award. Again there was a copious record from which could be gleaned either support for the award or "manifest disregard" of the law, had such existed. The Second Circuit ordered a remand to arbitrators to deal with a contingency unforeseen at time of the award which developed thereafter.

In Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551 (2d Cir. 1985), which was cited by the Columbia Circuit for the proposition that arbitrators may render a lump-sum award without disclosing their rationale for it and courts will not inquire into the basis therefor unless they believe that the arbitrators rendered it in "manifest disregard" of the law or the facts fail to support the award, it is unclear whether an arbitration record of some sort was or was not available to the District Court. Final briefs submitted to the arbitrators by the

parties were available to the District Court, and a representative of one party had testified at a deposition which was available to the District Court. The lump-sum award was unambiguous and not subject to challenge, as the instant award is, as having been made by arbitrators who exceeded their powers in violation of arbitration rules.

In sum, the Columbia Circuit decision puts the Columbia Circuit into conflict with the Second Circuit by granting immunity to lump-sum awards from remand for explanation of how damages were computed, where the award was made with no arbitration record of any sort, whether complete or incomplete, and with no opinion explaining its meaning even where there is strong reason to think the arbitrators exceeded their powers in determining controversies before them.

Nor does Wilko v. Swan, 346 U.S. 427, 436 (1953) show that the Second Circuit is

incorrect in giving critical value to availability of some record from which support for an unexplained lump-sum award may be gleaned. This Court said there 37 years ago that the arbitrators' award "may be made without any explanation of their reasons and without a complete record of proceedings..." It did not say, as the Columbia Circuit has said in this case, that a lump-sum award is immune from all judicial remand for clarification of the manner in which it was computed where made without any arbitration record whatsoever, either complete or less than complete, from which grounds for the award or an explanation of its meaning may be gleaned by a District Court.

The federal policy favoring arbitration is well known. But there is no federal policy favoring maintenance of obstructions to bringing to light "manifest disregard" of the law or arbitration's exceeding its

jurisdiction. This Court has rather concluded that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." Shearson/ American Express, Inc. v. McMahon, ____ U.S.____, 107 S. Ct. 2332, 2340 (1987).

The Columbia Circuit is alone, and is in conflict with five other circuits, in holding that a lump-sum award is immune from all judicial remand for explanation of how the damages were computed where there is no arbitration record of any sort from which support for or understanding of the award may be gleaned, absent probability of manifest disregard of the law appearing from the (non-existent) record or failure of facts to support it. No other circuit has taken this position. This conflict is seen in the following decisions of other circuits relied on vainly by the District Judge:

Third Circuit: NF & M Corp. v. United Steelworkers of America, 524 F.2d 756, 760

(3d Cir. 1975) ("An arbitrator is not required to list his reasons for an award. An ambiguity in his opinion should not be seized on to support an inference that he exceeded his authority... Nevertheless, if an examination of the record reveals no support whatever for his determinations, his award must be vacated.")

Fifth Circuit: Oil Chemical & Atomic Workers International Union v. Rohm & Haas Texas, Inc., 677 F.2d 492, 495 (5th Cir. 1982) (per curiam) ("remand to the arbitrators is the appropriate disposition of an enforcement action when an award is patently ambiguous..")

Sixth Circuit: Cleveland Paper Handlers & Sheet Straighteners Union v. E.W. Scripps Co., 681 F.2d 457, 460 (6th Cir. 1972) ("an ambiguous award may not be enforced but should be remanded to the arbitrator.")

Seventh Circuit: Galt v. Libby-Owens-Ford Glass Co., 397 F.2d 439, 442 (7th Cir. 1968) (Construction contract dispute over payment of a bill. Arbitration which produced a transcript of proceedings awarded a sum to one party. Held: because the award did not mention a payment clause in the contract, and it being unclear whether the arbitrators had considered the clause, the District Court properly remanded to arbitrators the question whether they had considered that clause.)

In Shearson Loeb Rhoades, Inc. v. Much, cited by the District Court as C.A. No. 81-4225 at 8-9 (N.D. Ill., Jan. 3, 1983), the District Court was moved by Shearson to vacate an arbitration award finding it liable in a certain damage amount to a customer. The District Court enforced the arbitrators' finding of liability but agreed that the damage amount was "sheer speculation". It remanded the matter to arbitrators for a

recalculation of damages. This is summarized in Shearson Loeb Rhoades v. Much, 754 F.2d 773, 775 (7th Cir. 1985).

The Columbia Circuit's Departure from the Second Circuit's rule puts it in conflict with these cases of the Third, Fifth, Sixth, and Seventh circuits.

Respondents recognized below in their May 31, 1988 motion before the District Court for certification of interlocutory appeal to the Columbia Circuit from the District Court's ruling that, "there are substantial controlling questions of law concerning the subject matter authority of this Court to require arbitrators to explain their award...as to which there are distinct differences of opinion within this Circuit and with other circuits;".

II

The three person panel exceeded its powers in determining a controversy involving in excess of $500,000.00 in

violation of New York Stock Exchange rules. The guidance given by the Court's decision is that judicial review of lump-sum arbitration awards is effectively abolished even as to clear exceeding of arbitral power where the arbitrators provide no record of any sort, no opinion, and no information on their method of computation of the award from which might be gleaned either support for the award or indications that they exceeded their powers.

Clear and conclusive evidence in the District Court record showed that the three arbitrators exceeded their powers under NYSE rule 607, if their lump-sum award "in full and final settlement" were considered to have determined Sargent's punitive damage claim. This conclusive showing, which was argued to the Columbia Circuit, was overlooked in its conclusion that, "Here there is nothing to suggest that the arbitrators indulged in any disregard of the law." The claim as submitted to the three person panel had a total amount in controversy of $ 800,000.00, well over the $ 500,000.00 threshold of NYSE rule 607 which then requires five

arbitrators. This was pointed out to NYSE arbitration authorities before the hearing. Sargent had agreed only to arbitration under rule 607. The three person panel had jurisdiction to hear only controversies involving less than $500,000.00. The Columbia Circuit thought that Sargent's suggestion that the panel had not resolved the punitive damage claim, since for it to do so would violate rule 607, was "utterly fanciful". PaineWebber had argued throughout in brief and in oral argument that the three person panel had determined Sargent's punitive damage claim. Undeniably, then, the three arbitrators exceeded their powers under rule 607 and 9 U.S.C. §10(d). The Columbia Circuit treated this violation of jurisdiction in silence. The significance is not merely that the Columbia Circuit erred in this case, which it plainly did. The greater significance is that this demonstrates the extent to

which the Columbia Circuit holding conflicts with rulings of the Second Circuit and other Circuits. If glaring, undeniable, demonstrated excess of arbitral powers like this is not sufficient to justify judicial query to the arbitrators as to their manner of computing damages and the meaning of their award, it is difficult to imagine what ever would be sufficient under the Columbia Circuit's rule. That the Columbia Circuit did not consider this patent violation justification for seeking arbitral clarification of the meaning of the cryptic lump-sum award demonstrates that the Columbia Circuit ruling conflicts fundamentally with the Second Circuit ruling it professes to adopt. The Columbia Circuit ruling effectively abolishes judicial review of lump-sum awards made without any record of arbitration proceedings or explanation of the meaning of the award, as the Second Circuit does not. It renders 9 U.S.C. §10(d) a nullity. It

conflicts fundamentally with the rulings of at least five other circuits which do maintain the judicial review within a narrow range which Congress intended. This abdication of judicial oversight will not increase small investor confidence in securities market operations. Investors who come to see that courts under the Columbia Circuit ruling have ceased carrying out the judicial review which Congress intended will not see this as a reason for putting their life's savings at risk in such an unjudicially protected churning arena.

III

> This case raises important, unresolved problems of lack of clarity of some lump-sum awards made without an arbitration record of any sort to explain their meaning.

Wilko v. Swan, 346 U.S. 427, 436 (1953) declared that the arbitrators' award may be made "without any explanation of their reasons and without a complete record of

proceedings." It did not say that all judicial requests for explanation of the award were foreclosed where there is no opinion, no arbitration record whatsoever, and no information on computation of damages from which may be gleaned either support for the award, explanation of its meaning where that is unclear, or indications that the arbitrators exceeded their powers.

Concern that greater clarity is needed in the arbitration award process exists. This concern was reflected in the introduction of the "Securities Arbitration Reform Act of 1988", H.R. 4960, 100th Cong., 2d Sess., Section 9 of which would require the arbitrator to give a brief written statement of the reasons for the decision and of the elements of the award. This requirement of the yet unenacted bill was opposed by NYSE Senior Vice President and Secretary James E. Buck, who has supervised arbitration

proceedings at the NYSE for 15 years. His statement was that "Commercial arbitration generally does not contemplate a written opinion, and it is not necessary for any business or oversight purposes. For oversight purposes, the pleadings, the verbatim typed transcripts of the proceedings, the exhibits and the award provide all the information that is required." Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce on H.R. 4960, 100th Cong., 2d Sess. (1988), p. 540. It is significant that Mr. Buck assumed that there is normally a transcript of arbitration proceedings available. That may well be normally the case under NYSE rules, and review of Second Circuit cases indicates that a transcript record is often available in cases which came before that Circuit. But NYSE rules do not require a record of arbitration proceedings; none was kept in the

instant case; and the Columbia Circuit goes beyond cases where some arbitration record is available, whether fully complete or not, and holds that a District Court may not remand for an explanation of the meaning of a lump-sum award or its manner of computing damages where there is no arbitration record whatsoever to clarify such, unless whatever record is before the District Court in the absence of the an arbitration record indicates the probability of "manifest disregard" of the law or absence of supporting facts.

Chairman Hon. Davis S. Ruder of the Securities Exchange Commission (SEC) testified concerning the importance of predispute arbitration clauses in customer trading accounts that a survey of broker-dealers accounting for approximately 90% of all customer trading in the United States showed that 96% of margin accounts, 95% of option accounts, and a growing 39% of all

cash accounts at firms responding to the SEC query are now subject to predispute arbitration clauses. Hearings, supra, p. 483. Chairman Ruder noted that the SEC believes that the H.R. 4960 legislation is premature, Hearings, supra, p. 488, but that, "The Commission has also urged that the arbitration process be subject to public scrutiny through the publication of arbitration results. This goal was furthered when members of SICA [Securities Industry Conference on Arbitration functioning under SEC oversight] reached a consensus on the form of written awards that would include the names of the parties in each case, a summary of the issues resolved, the relief sought or the amount of monetary damage claimed, the damages awarded, the names of the arbitrators, and whether they concurred with or dissented from the award. The SICA proposal appears to be well designed to inform both the parties

and the public of the matters resolved through arbitration. I am hopeful that the SROs [Self Regulating Organizations subject to SEC oversight] will act quickly to implement this proposal." Hearings, supra, pp. 481, 489.

These hearings showed the concern with the importance of the unresolved problems attendant on lump-sum awards made with no arbitration record of any sort and no explanation of their grounds or meaning.

CONCLUSION

The Columbia Circuit ruling introduces confusion and conflict among the circuits in reshaping the Second Circuit rule in manner effectively abolishing judicial review of lump-sum arbitration awards made without an arbitration record of any sort to explain their meaning. The efficiency which the Columbia Circuit ruling aims to bolster acts

to prevent disclosure of arbitrators' exceeding their powers. District Court judges need guidance from this Court. That guidance should not be to be sturdily insensitive to indications that arbitrators have exceeded their powers where, as here, they plainly have. It should be to exercise the judicial review of arbitration awards which Congress intended they should within a narrow range, and not to abdicate their responsibility.

Respectfully submitted,

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